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**03-622**

CHIEF JUSTICE: THE LAST CASE ON THE COURT'S DOCKET THIS MORNING STATE VERSUS BODDEN. GOOD MORNING. IF COUNSELL READY TO PROCEED, YOU MAY PROCEED.

THANK YOU. MAY IT PLEASE THE COURT. GOOD MORNING, YOUR HONORS. MY NAME IS JENNY SCAVINO SIEG, AND ON BEHALF OF THE PETITIONER, I REPRESENT THE STATE OF FLORIDA, AND I ASK THIS COURT TO ANSWER THE QUESTIONS CERTIFIED BY THE THIRD DISTRICT COURT OF APPEAL IN THE NEGATIVE AND CONCLUDE THAT THE FLORIDA DEPARTMENT OF LAW ENFORCEMENT DID NOT HAVE TO PROMULGATE A RULE WITH RESPECT TO URINE TESTING, IN SECTION 16.1392.

YOU ESSENTIALLY WANT US TO ADOPT THE REASONING OF THE STATE VERSUS PIERRE FROM THAT DISTRICT?

THAT'S CORRECT, YOUR HONOR.

THIS IS A STRICT STATUTORY CONSTRUCTION QUESTION.

YES.

ALL RIGHT, SO WHAT PRINCIPLE OF STATUTORY CONSTRUCTION SHALL WE BE LOOKING AT, AS TO WHETHER, WE HAVE TO LOOK AT WHETHER APPROVED, MODIFIES URINE TEST?

YES. THAT'S CORRECT.

AND TELL US HOW WE SHOULD BE GUIDED IN DETERMINING WHETHER APPROVED, MODIFIES URINE TEST?

WITH RESPECT TO, I THINK, THE FIRST ERROR THAT THE SECOND DISTRICT CONCLUDED, IS THAT THEY, OR THE SECOND DISTRICT MADE, WAS THAT THEY INTERPRETED THE STATUTE, THE PARTICULAR STATUTE, AS BEING AMBIGUOUS, AND I THINK THAT THE FIRST RULE OF CONSTRUCTION THAT THIS COURT SHOULD LOOK TO, IS TO LOOK AT THE PLAIN LANGUAGE OF THE MEANING OF THE STATUTE, AND ACTUALLY DETERMINE, IN FACT, THAT CONCLUSION WAS AN ERROR, THAT THIS PARTICULAR STATUTE IS NOT AMBIGUOUS. THE TERM "APPROVED" IN SECTION 316.1932, USING THE LANGUAGE, WOULD CERTAINLY APPLY TO BLOOD AND BREATH TESTS, BUT BASED ON THE CONSTRUCTION OF THE GRAMMATICAL CONSTRUCTION OF THE STATUTE, I DON'T THINK THAT THE WORD "APPROVED" ALSO APPLIES TO URINE TESTING.

WITH THAT REGARD, WHAT IS THE PREDICATE THAT HAS TO BE LAID, FOR THE ADMISSION OF AN URINE TEST?

WELL, URINE TESTING OR THE URINE TEST RESULTS, WHAT THE STATE WOULD HAVE TO, I THINK, THE TEST RESULTS, ITSELF, JUST COMES --

BUT HOW, WHAT BASIS IN RELIABILITY HAS TO BE LAID AS A PREDICATE, FOR THAT TO BE ADMITTED, SO THAT THERE CAN BE A DETERMINATION? I MEAN, JUST ANY URINE TEST? THAT SOMEBODY STANDS UP AND SAYS THIS IS AN URINE TEST? I MEAN, THAT IS MY PROBLEM, IS THAT I DON'T UNDERSTAND WHAT IS THE BASIS OF DETERMINING WHICH URINE TESTS ARE RELIABLE

AND WHICH ARE NOT.

WELL, THE LEGISLATURE ACTUALLY, IN SECTION OR SUBSECTION A-1, ACTUALLY DOES DISCUSS HOW A LAW ENFORCEMENT OFFICER NEEDS TO OBTAIN AN URINE TEST, AND SPECIFICALLY STATES THAT IT NEEDS TO BE INCIDENTAL TO A LAWFUL ARREST THAT, IT HAS TO BE ADMINISTERED AT A DETENTION AS ILLUSTRATE, AND THAT -- FACILITY, AND THAT THAT FACILITY WOULD HAVE TO BE EQUIPPED TO ADMINISTER SUCH TESTS AT THE REQUEST, IT ALSO REQUIRES THAT THE URINE TEST BE ADMINISTERED IN A REASONABLE MANNER THAT WILL ENSURE THE RELIABILITY OF THE TEST.

THAT DOESN'T SPEAK, DOES IT, REALLY, TO JUSTICE WELLS'S QUESTION, IN TERMS OF WHAT ARE WE TALKING ABOUT HERE? SURELY YOU ARE NOT ATTRIBUTING TO THE LEGISLATURE, THAT THEY WOULD NOT WANT A, QUOTE, APPROVED", OR RELIABLE TEST TO BE CONDUCTED, SO IF WE LEAVE THAT OUT OF THE EDUCATION, AREN'T -- OUT OF THE EQUATION, AREN'T WE REALLY SAYING, WELL, ANY TEST, THEN, WOULD BE ALL RIGHT. THE OFFICER COULD GO TO THE DRUGSTORE AND GET A COMMERCIAL TEST THAT MIGHT BE AVAILABLE, OR SOMEBODY COULD SAY, YOU KNOW, THAT, IS ON DUTY AT THE FACILITY, THAT, WELL, YOU KNOW, WE COULD JUST LOOK AT THE URINE, AND IF THE URINE IS VERY DARK, WE KNOW THAT THERE IS A CERTAIN AMOUNT OF ALCOHOL IN THERE. WHY WOULD WE ATTRIBUTE, TO THE LEGISLATURE, THAT IT USE THE WORD APPROVED BEFORE THESE OTHER TWO TESTS SPECIFICALLY, THAT THEY WOULDN'T WANT THE SAME QUALITY OF RELIABILITY FOR THE URINE TEST THAT THEY WOULD WANT FOR THE TWO OTHER TESTS THAT ARE MENTIONED IN THE SAME PARAGRAPH? WOULDN'T THAT SORT OF BE INCONSISTENT WITH WHAT WE WOULD ORDINARILY PERCEIVE TO BE THE LEGISLATIVE INTENT?

I THINK THE MOST IMPORTANT DISTINCTION THAT I THINK THIS COURT SHOULD LOOK TO AS TO, PROBABLY, WHY THE LEGISLATURE MADE A DIFFERENCE BETWEEN BLOOD AND BREATH TESTS AS OPPOSED TO URINE TESTS, I THINK THE CRUX OF THAT DIFFERENCE, REALLY, DOES DEPEND ON AT TRIAL, WHAT TYPE OF BENEFIT DOES THE STATE GET. CERTAINLY THE RELIABILITY, IN TERMS OF BLOOD AND BREATH TESTS, IS VERY IMPORTANT IN TERMS, BECAUSE YOU ARE TESTING THE ALCOHOLIC CONTENT OF THE PERSON'S BLOOD OR BREATH AND ONCE BASED ON THOSE RESULTS, YOU ARE NOT TESTING WHETHER ALCOHOL IS PRESENT, BUT THE STATE ACTUALLY WOULD RECEIVE A BENEFIT OF PRODUCTION, IF THAT NUMBER OR TEST RESULT IS EITHER .08 IN A BLOOD TEST OR IN A BREATH ANALYSIS THERE, IS A CERTAIN NUMBER AS WELL, WHEREAS IF YOU LOOK AT URINE TESTING, THE TEST RESULT ONLY TELLS WHETHER OR NOT SOMETHING IS POSITIVE OR NEGATIVE FOR A PARTICULAR SUBSTANCE, AND ACTUALLY DEPOSITION OF DALE LIVINGSTON, IT IS SENIOR ANALYST IN THE THIS RECORD, ACTUALLY WOULD FEEL UNCOMFORTABLE ABOUT MAKING ANY KIND OF CONCLUSION THAT BASED ON THAT NUMBER, ARE JUST BASED ON THAT PRESENCE OF THAT PARTICULAR CONTROLLED SUBSTANCE THAT THE DRIVER WAS IMPAIRED.

TO ADMIT THIS LATER IN COURT, YOU AGREE THAT THERE HAS TO BE THIS PROOF OF RELIABILITY, AND CERTAINLY, SHOULDN'T WE BE ENCOURAGING, CERTAINLY, THE STATE AGENCIES, THAT, IF THEY ARE GOING TO HAVE RELIABLE TESTS, THAT THEY ESTABLISH SOME STANDARDS, WHERE YOU CAN HAVE A TEST THAT THEY APPROVE, THAT IS THAT BECAUSE WE ARE GOING TO FACE, DOWN THE ROAD, WELL, FIRST OF ALL, BECAUSE WE WANT TO GET IT RIGHT, YOU KNOW, BUT ALSO BECAUSE WE ARE GOING TO FACE, DOWN THE ROAD, HAVING TO ADMIT THIS INTO A COURT OF LAW, WE DO WANT TO SET STANDARDS, AND WE WANT THERE TO BE YOU KNOW, WHETHER THERE IS ONE OR A DOZEN TEST THAT IS WE THINK WOULD BE RELIABLE, WE WANT TO LIST THOSE, AND WE WANT TO BE SURE THAT OUR OFFICERS ARE CONDUCTING THIS TEST, PURSUANT TO THOSE STANDARDS THAT WE ESTABLISHED, SO WHY WOULDN'T WE IMPUTE THAT INTENT ON THE PART OF THE LEGISLATURE, THAT THEY WOULD NOT WANT IT TO BE AN UNAPPROVED OR STANDARDLESS KIND OF TEST THAT WAS CONDUCTED?

WELL, THE LEGISLATURE, I THINK, IN LOOKING AT THE LANGUAGE IN THE STATUTE, I THINK, IT IS

NOT AMBIGUOUS THAT THEY REQUIRED, FOR WHATEVER, FOR VARIOUS REASONS, THAT BLOOD AND BREATH SHOULD BE APPROVED AND URINE SHOULDN'T, AND I THINK THERE IS OTHER LEGISLATIVE INTENT TO SUPPORT THAT FINDING, THAT BEING, FIRST OF ALL, THERE IS LEGISLATIVE HISTORY WITH RESPECT TO THE ENACTMENT OF SECTION 316 --

WAIT A MINUTE. IF WE GET INTO LEGISLATIVE HISTORY, THEN WE ARE SAYING THAT THERE IS AMBIGUITY. AND SO LET'S JUST STICK FOR A MINUTE, WITH THE PLAIN LANGUAGE AND ALSO, AS YOU SAY, HOW IT OPERATES. AS I UNDERSTAND WHAT YOU ARE SAYING, IS THAT UNLIKE ANY OTHER KIND OF TEST THAT MAY BE USED, SUCH AS FINGERPRINT ANALYSIS OR DN A OR WHATEVER, WHICH DOESN'T HAVE TO BE, HAVE RULE PROMULGATED AND BE ACTUALLY APPROVED THROUGH AN ADMINISTRATIVE PROCESS, THAT FOR WHATEVER REASON, THE REASON THAT YOU ARE SAYING THAT THE LEGISLATURE WOULD HAVE TREATED BLOOD AND BREATH DIFFERENTLY, IS BECAUSE IF IT IS DONE PURSUANT TO THIS APPROVED PROCEDURE, THEN YOU GET THIS VERY POWERFUL PRESUMPTION OF IMPAIRMENT, WHICH ESSENTIALLY UNDER DRIVING WITH AN UNLAWFUL BLOOD ALCOHOL, MAKES THE DEFENDANT GUILTY OF THE CRIME. THERE IS NOTHING EQUIVALENT TO THAT, IN ANY OTHER AREA OF GETTING SCIENTIFIC EVIDENCE AND TELLING THE JURY ABOUT THAT, CORRECT? OTHER THAN THIS PRESUMPTION 6 IMPAIRMENT. -- OF IMPAIRMENT.

I THINK IT IS ABSOLUTELY --

AND WE SAID, IN MILES, IF THEY DIDN'T DO THAT, AND THEY GOT, AND THE EVIDENCE CAME IN UNDER THE TRADITIONAL PREDICATE OF RELIABILITY ESTABLISHED, THAT THEY COULDN'T GET THE PRESUMPTION OF IMPAIRMENT, CORRECT?

THAT'S CORRECT.

AND SO, WHEN URINE TESTS COME IN FIRST, THE FIRST QUESTION IS THE JUDGE IS THE GATEKEEPER AND HAS TO MAKE SURE THAT IT MEETS RELIABILITY, AND IF IT DOESN'T, THE STATE DOESN'T GET THAT EVIDENCE IN, JUST LIKE ANY OTHER EVIDENCE, SUCH AS DN A OR FINGERPRINT OR HANDWRITING OR EYEWITNESS, ANYTHING ELSE, CORRECT?

I THINK THAT IS CORRECT.

THEIR ANALYSIS.

AND I THINK ALONG THE LINE WITH THE HAIR ANALYSIS AND THE DNA, I THINK IF THE STATE MERELY RECEIVES THE RESULT AFTER PARTICULAR DEFENDANT AND THE RESPONDENT IN THIS CASE TESTED POSITIVE FOR CANNABIS, THAT IS NOT GOING TO BE THE ONLY BASIS FOR THE STATE TO PURSUE CHARGES. CERTAINLY IN THIS CASE, THERE WAS OTHER EVIDENCE, AND I THINK A POSITIVE URINALYSIS FOR WHATEVER THE CONTROLLED SUBSTANCE IS, IS JUST MERELY ANOTHER PIECE OF EVIDENCE TO EVIDENCE THE -- EVIDENCE THE STATE ADMITS AT TRIAL, THAT SUPPORTS THEIR CHARGES OF DUI.

BUT IF THE STATE WENT OUT AND GOT A DRUGSTORE ANALYSIS FOR URINE TEST, THE STATE WOULD ATTACK THAT AS BEING AN UNRELIABLE -- THE DEFENDANT WOULD ATTACK THAT AS BEING A UNRELIABLE TEST.

ABSOLUTELY.

CERTAINLY THIS DOESN'T PROMULGATE DEFENDANTS IN HOW THEY WANT AN URINE TEST TO GO, CORRECT? THE ONLY ISSUE FOR "APPROVED" IS WHETHER IT IS GOING TO GO THROUGH THE ADMINISTRATIVE PROCEDURE FOR RULE PROMULGATION?

THAT IS ABSOLUTELY CORRECT, BUT ANOTHER ERROR THAT I THINK THE DISTRICT MADE IN

ANSWERING THE QUESTION IN THE POSITIVE OR IN THE AFFIRMATIVE, WAS THAT THEY, ALSO, CONCLUDED THAT FDLE, BASED ON THE STATUTORY LANGUAGE IN THIS SECTION, HAD THE AUTHORITY TO PROMULGATE RULES WITH RESPECT TO URINE TESTING BUT JUST DIDN'T, AND I THINK THAT --

WHICH IT DID NOT, YOU ARE SAYING.

WHICH IT DID NOT, CORRECT.

THEREFORE, IF THE LEGISLATURE INTENDED THAT THOSE TESTS HAD TO BE APPROVED THROUGH THE ADMINISTRATIVE PROCESS, THERE IS A FATAL DEFECT IN THE STATUTE, BECAUSE IT DOESN'T GIVE FDLE THE AUTHORITY THE AUTHORITY TO PROMUL-- FDLE THE AUTHORITY TO PROMULGATE RULES, BECAUSE THERE IS NO PARTICULAR TESTING.

YES. IN THIS STATUTE, THE LEGISLATURE VERY CLEARLY PROMULGATED FDLE, RESPECT TO BLOOD AND BREATH TESTING AND EXCLUDED ANY MENTION OF URINE TESTING, SO THAT BASED ON ITS OWN, THE FDLE STATUTE COULD NOT PROMULGATE RULES WITH REGARD TO URINE TESTING, BECAUSE THERE ISN'T ANY KIND OF ENABLING STATUTE TO ALLOW THEM TO DO THAT, AND UNDER CHAPTER 120, I THINK IF FDLE JUST BEGAN THAT PROCESS, I THINK THAT PROCESS COULD BE STRUCK DOWN, SO THAT IS A SECOND ERROR THAT THE SECOND DISTRICT MADE, WITH RESPECT TO ANSWERING THE CERTIFIED QUESTION IN THE AFFIRM -- TO ANSWERING THE CERTIFIED QUESTION IN THE AFFIRMATIVE. FINALLY, THE SECOND DISTRICT, ALSO, CONCLUDED THAT, EVEN IF THE STATUTE WAS AMBIGUOUS AND THAT FDLE DID HAVE THE AUTHORITY TO PROMULGATE RULES BUT DID NOT, THAT THE URINE TEST, ITSELF, COULD NOT BE ADMISSIBLE, UNDER THE TRADITIONAL RULES OF PREDICATE, WHICH ESSENTIALLY FORECLOSED, AFTER THIS DECISION, THE STATE FROM EVER INTRODUCING URINE TESTING ADMISSIBILITY THAT WAS SUBMITTED AFTER A RESPONDENT, AFTER IMPLIED CONSENT, AND I THINK THAT FINDING WAS INCORRECT, BASED ON THE FACT THAT IT BASED, THE SECOND DISTRICT BASED ITS DECISION ON A FIRST DISTRICT CASE, STATE VERSUS POLLACK FROM 1992, THAT HELD THAT JUST BECAUSE A BREATH TEST OR AN INTOXLIZER MACHINE HAD NOT BEEN CALIBRATED CORRECTLY AND WAS NOT APPROVED, THAT IT MADE IMPLIED CONSENT INVOLUNTARY, THERE AND FOR EVEN UNDER THE TRADITIONAL RULES OF PREDICATE IN THAT PARTICULAR CASE, THE BREATH TEST RESULTS COULD NOT COME IN AS EVIDENCE.

THE LEGISLATURE HAS, SINCE, CHANGED THIS PARTICULAR SECTION OF THE STATUTE, I PRESUME, IN REACTION TO THE SECOND DISTRICT OPINION HERE. DOES THAT HELP YOUR ARGUMENT IN ANY WAY?

MOST DEFINITELY. I THINK, I THINK FROM THE ONSET, THE PREVIOUS STATUTE, PRIOR TO THE LEGISLATURE AMENDING THE STATUTE THAT WENT INTO EFFECT IN MAY, THE LACK ALONE, MAKES IT UN -- THE LANGUAGE ALONE, MAKES IT UNAMBIGUOUS THAT THE LEGISLATURE ONLY INTENDED IT TO APPLY TO BLOOD AND BREATH. I THINK THE NEW STATUTE, WHICH WAS ENACTED IN RESPONSE TO THE SECOND DISTRICT'S DECISION, WHAT IT EASY ESSENTIALLY DID WAS, IN SUBSECTION 1-A-1, IMPLIED CONSENT READ THAT A PERSON SUBMITTED TO ESSENTIALLY TWO DIFFERENT KINDS OF TESTS, A BLOOD OR BREATH TEST TO DETERMINE THE ALCOHOLIC CONTENT, AND THEN AN URINE TEST, TO DETERMINE THE PRESENCE OF A CONTROLLED SUBSTANCE.

SO THE NEW STATUTES STILL DON'T REQUIRE OR SPECIFICALLY DON'T REQUIRE THE URINE TEST TO GO THROUGH THE APPROVAL PROCESS OF THE ADMINISTRATIVE PROCEDURE ACT.

NO, IT DOESN'T.

THEY JUST USE THE SAME, ALTHOUGH THEY HAVE SEPARATED INTO A SECOND, SEPARATE SECTION, THE ONLY REQUIREMENTS ON IT IS THAT IT BE ADMINISTERED AT A DETENTION

FACILITY OR OTHER FACILITY EQUIPPED TO ADMINISTER SUCH TEST INS A REASONABLE MANNER, SO IT IS THE SAME EXACT LANGUAGE AS WAS EMPLOYED PREVIOUSLY.

YES, IT IS. ALL IT DID WAS JUST MAKE URINE TESTING ITS OWN SUBSECTION, AND I THINK THAT ELIMINATES ANY KIND OF QUESTION AS TO WHETHER OR NOT THERE IS ANY AMBIGUITY IN THE STATUTE AS TO WHETHER OR NOT THE LEGISLATURE INTENDED THE WORD "APPROVED" TO MODIFY THE TERM URINE TESTING. FINALLY, I JUST WOULD ASK THIS COURT TO ANSWER THE CERTIFIED QUESTION IN THE NEGATIVE AND CONCLUDE THAT FLORIDA STATUTES IS AMBIGUOUS OR IS NOT AMBIGUOUS ON ITS FACE THAT, THE LEGISLATURE CLEARLY INTENDED FOR BLOOD AND BREATH TESTS TO APPLY TO OR TO BE APPROVED, AND FOR URINE TESTS TO NOT BE APPROVED AND TO CONCLUDE THAT FDLE DOES NOT HAVE THE AUTHORITY TO PROMULGATE RULES WITH RESPECT TO URINE TESTING.

APPROVED IS NOT SYNONYMOUS WITH RELIABLE. RELIABILITY IS A LINCHPIN OF THE ADMISSIBILITY OF ANY EVIDENCE IN A --

CERTAINLY.

-- CRIMINAL CASE.

YES. THANK YOU.

CHIEF JUSTICE: THANK YOU VERY MUCH. COUNSEL.

IF IT PLEASES THE COURT, ATTORNEY FOR THE STATE OF FLORIDA, GOOD MORNING, YOUR HONORS. FOR THE RECORD, MY NAME IS EILAM ISAAC A PARTNER IN THE LAW FIRM OF ISAAC AND ZWIRN. MY PARTNER IS JEFFREY ZWIRM AND THE YOUNG LADY SITTING WITH ME AT COUNSEL TABLE IS A PROUD JEWISH MOTHER, ALSO A MEMBER OF THE BAR, PRACTICING IN FLORIDA FOR ALMOST 30 YEARS. SHE IS A PARTNER OF THE FIRM OF FEINBERG, ISAAC AND SMITH, ALSO LOCATED IN TAMPA AND SHE IS ALSO LICENSED TO PRACTICE LAW IN ISRAEL. I DO WANT TO TAKE ONE BRIEF MOMENT, TO MAKE SURE THAT THE FACTS ARE UNDERSTOOD. MY CLIENT WAS ARRESTED FOR DUI. HIS BREATH TEST RESULT WAS BELOW THE LEGAL LIMIT. HE WAS GIVEN AN IMPLIED CONSENT WARNING, TELLING HIM SPECIFICALLY THAT HE WOULD SUBMIT TO AN APPROVED TEST FOR BREATH AND URINE. HE SUBMITTED, THE BREATH TEST RESULT WAS BELOW THE LEGAL LIMIT. HE SUBMITTED TO THE URINE TEST, BASED UPON THAT REQUEST, AND IT CAME BACK TESTING POSITIVE FOR CONTROLLED SUBSTANCE.

WHY ISN'T JUDGE TWERPE'S OPINION IN THE FIFTH DISTRICT CORRECT, THAT THE LEGISLATURE COULD WE WILL HAVE MADE THE DETERMINATION THAT ITS CRITERIA SET UP THE STATUTE FOR THE URINE TESTS, WERE SUFFICIENT?

I AM SORRY. I DIDN'T FOLLOW THE QUESTION.

OKAY. JUDGE TWERPE SAID, IN HIS OPINION IN THE FIFTH DISTRICT.

YES.

THAT THE LEGISLATURE, IN RESPECT TO URINE TESTS, THAT THE LEGISLATURE APPARENTLY CONCLUDED THAT ITS OWN BASIC GUIDELINES WERE SUFFICIENT FOR THIS RATHER SIMPLE TEST. BUT THAT MORE COMPREHENSIVE PROCEDURES SHOULD BE DEVELOPED FOR BLOOD TESTING. WHY ISN'T THAT CORRECT?

I AM SORRY?

WHY IS THAT NOT RIGHT?

I AM SORRY. IT IS NOT CORRECT FOR A NUMBER OF REASONS. FIRST OF ALL, YOU CAN'T JUST LOOK AT THE IMPLIED CONSENT LAW, AND WE ARE TALKING ABOUT FOR NONCOMMERCIAL DRIVERS, WHICH IS 316.922 BY ITSELF AND YOU ALSO HAVE TO CONSIDER 322.9 -- 316.923, WHICH IS FOR COMMERCIAL DRIVERS. THE ONLY DIFFERENCE BETWEEN THE TWO IS 316.922 IS MORE VERY BOWS. THEY BOTH -- VERBOSE. THEY BOTH USE THE WORDS APPROVED, BREATH, BLOOD AND URINE, BUT IN 316.923, THEY INCLUDED WHAT A BREAST TEST IS, INCLUDED BUT NOT ONLY AN INFRA RED TEST FOR BREATH. SPECIFICALLY AS TO 9 23rd LANGUAGE SAYS THE PERSON APPROVED BY THE EXTENDED LAWS OF OPERATING A COMMERCIAL VEHICLE WITHIN THE STATE, SHALL, BY SO OPERATING SUCH COMMERCIAL VEHICLE, HE DEEMED TO HAVE GIVEN HIS OR HER CONSENT TO AN APPROVED TEST CONCERNING HIGGS BLOOD, BREATH OR UNION. IN 923.622 THEY ADD FOR BLOOD, BREATH OR ALCOHOLIC CONTENT. IN SAYING APPROVED AND THIS GETS BACK TO YOUR QUESTION, JUSTICE PARIENTE, DOES THE WORD "APPROVED" MODIFY THE URINE TEST, AND THE ANSWER HAS TO BE YES. THERE IS NO REASON TO ASSUME THAT JUST BECAUSE 316.1932 IS MORE REMEMBER BOWS, THAN 322.63, THAT FOR SOME REASON NOW, THE TERM APPROVED DOES NOT APPLY TO URINE. VERY CLEARLY, UNDER 322.63, THEY HAVE AUTHORIZED OR REQUIRED AN APPROVED URINE TEST AND --

HAS THE LEGISLATURE GIVEN THE FDLE AUTHORITY TO DEVELOP A METHOD FOR APPROVING AND PROMULGATE AGO RULE?

SPECIFICALLY UNDER 322.63, SUBSECTION 3, PARAGRAPH A, IT SAYS THE PHYSICAL AND CHEMICAL TESTS AUTHORIZED IN THIS SECTION SHALL BE ADMINISTERED SUBSTANTIALLY IN ACCORDANCE WITH RULES ADOPTED BY THE DEPARTMENT OF LAW ENFORCEMENT. THEY SPECIFICALLY REQUIRE FDLE, AND AS WE STAND HERE TODAY, JUSTICE CANTERO --

DOES THIS APPLY TO COMMERCIAL OR ALL VEHICLES?

THAT IS COMMERCIAL VEHICLES. HOWEVER, YOU CAN'T TREAT, AND THIS GETS INTO AN ARGUMENT ON EQUAL PROTECTION, BUT YOU CAN'T TREAT NONCOMMERCIAL DRIVERS DIFFERENTLY THAN COMMERCIAL.

THAT IS A DIFFERENT ARGUMENT YOU CAN MAKE, AN EQUAL PROTECTION ARGUMENT IF YOU WANT, BUT RIGHT NOW WE ARE SAYING WHAT THE PLAIN LANGUAGE OF 1932 SAYS, ANDION HOW WE CAN SAY WHAT THE PLAIN LANGUAGE OF 1932 SAYS, BY LOOKING AT ANOTHER STATUTE.

BECAUSE IT GIVES GUIDANCE. I THINK YOU HAVE TO READ EVERYTHING IN PARI MATERIA. IT DOESN'T MAKE ANY SENSE TO SAY THAT WE ARE GOING TO GIVE APPROVED BREATH TEST, APPROVED BLOOD TEST, APPROVED URINE TEST TO COMMERCIAL DRIVERS.

IF YOU READ 323, IT SAYS A MORE REASONABLE TEST. OTHER THAN THE REST OF WHAT YOU QUOTED, IF YOU READ THE REST OF THE SUBSECTION, DOESN'T IT SAY THAT YOU CAN USE ALTERNATE TESTS, REASONABLE TESTS AND WHATEVER, AS TO URINE?

I DON'T READ THAT IN THE STATUTE. I DIDN'T SEE THAT THERE.

BUT THE STATUTE DOES SAY, GOING BACK TO JUDGE TWERPE'S OPINION, HE SAYS THAT IT SPECIFICALLY IS SET FORTH IN THE STATUTE, AND AS YOUR OPPONENT POINTED OUT, THE URINE TEST SHALL BE ADMINISTERED AT A DETENTION FACILITY, AND THOSE OTHER CRITERIA.

CORRECT.

IN 316.1932. AND THEN HE SAYS THE LEGISLATURE AND APPARENTLY CONCLUDED THAT ITS OWN BASIC GUIDELINES WERE SUFFICIENT. NOW, HOW CAN WE SAY THAT IT WAS TOTALLY UNREASONABLE, THAT THAT IS A TOTALLY UNREASONABLE CONSTRUCTION, THAT WHAT THE LEGISLATURE DID WAS SET FORTH THESE BASIC GUIDELINES, AND THEN USED LANGUAGE THAT

SEPARATES THE URINE TEST FROM A CHEMICAL TEST. THAT IS WHAT I AM GETTING AT IS HOW UNREASONABLE?

THE PROBLEM IS, THE REASON IT IS UNREASONABLE, AND I BELIEVE YOU HAVE TO BEGIN WITH THE RICENER DECISION, WHICH CAME OUT AT 584 SO.2D 181, AND THE LANGUAGE SAYS THE INTENT OF THE PURPOSE FOR SPEAKS FLYING THE METHOD AND MEANS FOR SUCH CHEMICAL TESTS IS TO ENSURE THAT ONLY RELIABLE TESTS ARE USED IN COURT PROCEEDINGS. IT SAYS IT MUST DO SO BY PROMULGATING RULES FORM THE REASON IS MY CLIENT IS FACING INCARCERATION AND A LOSS OF LICENSE, BASED UPON THE TESTING OF THE URINE.

BUT THERE ARE ENYOU MEANABLE SCIENTIFIC -- NUMBERABLE SCIENTIFIC TYPE OF TESTS, SUCH AS SCIENTIFIC HAIR ANALYSIS AND THE DEATH PENALTY THAT, DON'T REQUIRE THE PROMULGATION OF RULES BY THE FLORIDA DEPARTMENT OF LAW ENFORCEMENT. IN GOING BACK TO YOUR REQUEST THAT WE LOOK AT 322.63, WHICH IS APPLICABLE TO COMMERCIAL LICENSES, I WOULD DRAW YOUR ATTENTION TO 3-A, WHICH SAYS THAT THE PHYSICAL AND CHEMICAL TESTS AUTHORIZED IN THIS SECTION, SHALL BE ADMINISTERED SUBSTANTIALLY IN ACCORDANCE WITH RULES ADOPTED BY THE DEPARTMENT OF LAW ENFORCEMENT, AND INCLUDES NO SUCH PREDICATE OR SUBDIVISION FOR URINE TESTS, SO IF YOU READ A STATUTE AS A WHOLE, THE, I THINK THAT WHERE IS IT THAT IT SAYS THAT, IN THAT SECTION, THAT THE URINE TEST, ALSO, HAS TO BE IN ACCORDANCE WITH RULES ADOPTED BY THE FLORIDA DEPARTMENT OF LAW ENFORCEMENT?

BECAUSE URINE TEST IS A CHEMICAL TEST! IT IS!

PHYSICAL AND CHEMICAL TESTS AUTHORIZED IN THIS SECTION, AND THEN WE GO BACK TO YOU ARE SAYING THAT CHEMICAL OR PHYSICAL TEST OF MISS HISS BLOOD OR BREATH OR URINE, SO THEY ARE NOT, THEY ARE SEPARATING IT OUT. THEY ARE TALKING ABOUT URINE IN SUBSECTION 3W6789, THE URINE TEST SHALL -- IN SUBSECTION B, THE URINE TEST, AND THEY EXPLAIN WHAT THAT IS IN SUBSECTION B.

OF 322.63?

OF --

WHICH ONE ARE YOU READ SOMETHING.

I AM READING UNDER, LET'S SEE, 2-B. THE URINE TEST SHALL ADMINISTER THE REQUEST WHO HAS REASONABLE CAUSE TO BELIEVE THE TEST SHALL BE ADMINISTERED AT A FACILITY, MOBILE OR OTHERWISE, THAT IS EQUIPPED TO ADMINISTER SUCH TEST INS A REASONABLE MANNER, TO ENSURE THE ACCURACY. THERE IS NO SUCH THING FOR A BREATH OR A BLOOD TEST.

I AGREE. THAT IS FINE. YOU ARE RIGHT. BUT WHEN YOU LOOK AT 3-A, IT SAYS THE PHYSICAL OR THE CHEMICAL TEST THAT IS WE HAVE TALKED ABOUT, HAVE TO BE SPECIFIED THROUGH THE PROMULGATION PROCESS, AND IN MY BRIEF, I DID ANALYZE WHETHER OR NOT THE PROCEDURE THAT DALE LIVINGSTON IN HIS DEPOSITION TALKED ABOUT, WHETHER THAT CONSTITUTES A RULE AND THEREFORE IS REQUIRED TO BE PROMULGATED AND IT IS, IT MEETS THE TEST UNDER THE BLACKHAWK CASE AS WELL AS VAN JERRY ENTERPRISES, AND THE REQUIREMENTS OF THE DUE PROS THESE GOES ALONG WITH PROMULGATION, MEANING THE PUBLICATION, PUBLIC COMMENTS, PUBLIC HEARINGS, SUBMISSION TO THE GOVERNOR'S OFFICE, THAT IS THE CITIZENRY'S OPPORTUNITY TO SAY, YES, WE GIVE IT THUMBS UP OR NO, WE GIVE IT THUMBS DOWN.

SO IS YOUR ARGUMENT, A PART OF YOUR ARGUMENT, RELIES ON THE FACT THAT YOU SAY THAT AN URINE TEST IS A CHEMICAL TEST, AND THEREFORE IS SUBSUMED UNDER "CHEMICAL".

ABSOLUTELY.

SO WHY DID THE LEGISLATURE, THEN, GO ON TO SAY "URINE TEST", IF IT IS SUBSUMED UNDER CHEMICAL TEST?

WHY DID THE LEGISLATURE GO THROUGH AND EXPLAIN WHAT A BREATH TEST IS, BY SAYING INCLUDED BUT NOT LIMITED TO AN INFRA RED LIGHT TEST OF YOUR BREATH. IT WOULD ALSO HAVE BEEN INCLUDED UNDER PHYSICAL TEST OR CHEMICAL TEST. THE FACT OF MATTER IS AND THIS IS WHY I SAID THE WORD "APPROVED" IS MODIFYING URINE TEST. THE IMPROVED PRIDE -- THE IMPLIED CONSENT LAW IS VERBOSE AND JUST BECAUSE IT IS VERBOSE, DOESN'T MEAN THAT 20 OR 30 WORDS APPEAR AFTER THE TERM "APPROVED" BEFORE YOU SEE THE WORD "URINE", THAT FOR SOME REASON THAT MEANS APPROVED DOESN'T APPLY TO THE URINE TEST?

IN ANY PLACE WHERE JUST WORD URINE TEST, APPEARS, IT STILL APPLIES TO ANY CHEMICAL TEST.

ABSOLUTELY. THE URINE TEST IS A CHEMICAL TEST, AND THAT IS WHY, WHEN, IF THE LEGISLATURE, AND I SUBMIT HAD THEY WANTED URINE TO BE SEPARATE, AND I SAID THIS IN MY BRIEF, THEY WOULD HAVE PUT A SEMI:. THE FACT THAT THEY JUST ADD -- A SEMI COLON. THE FACT THAT THEY JUST ADD A COMMA, MEANS THAT IN VERBOSE LANGUAGE THEY HAD TO ADD WHAT A BREATH TEST IS AND THEY WANTED TO USE THE TERM "APPROVED". THE FACT IS THEY COULD HAVE SEPARATED THAT OUT WITH A SEMI COLON.

THEY HAVE DONE THAT NOW, DO YOU AGREE?

YES, BUT WITH ALL DUE RESPECT, JUSTICE BELL, WHAT THEY HAVE DONE NOW DOESN'T REFLECT WHAT THEY HAD DONE TEN YEARS AGO. THERE IS NOTHING SUBMITTED IN THE RECORD BY MYSELF OR THE STATE ATTORNEY THAT DEBATES FROM THE FLOOR OF THE LEGISLATURE OR ANY SORT OF INDICATION WHAT THE ACTUAL INTENTION OF THE LEGISLATURE WAS, WHEN THEY PROMULGATED OR WHEN THEY PASSED THE IMPLIED CONSENT LAW IN 1993, WHICH IS WHEN FDLE TOOK OVER FROM HRS.

IS THERE CONCERN ABOUT THE RELIABILITY OF BREATH TESTS AND CHEMICAL TESTS FOR ALCOHOL IN DUI CASES?

ABSOLUTELY. IS THE SAME CONCERN THERE FOR URINE TESTS, WHICH DO --

IS THE SAME CONCERN THERE FOR URINE TESTS, WHICH DO NOT NECESSARILY REACH THE NUMBER OF PRESUMPTION, BUT IT JUST TESTS FOR THE PRESENCE AFTER SUBSTANCE THAT IS USED BY EMPLOYERS, BY -- PRESENCE OF A SUBSTANCE. THAT IS USED BY EMPLOYERS, BY PROBATION OFFICERS ALL OVER THE STATE OF FLORIDA AND THIS COUNTRY, URINE TESTS ARE USED ALL THE TIME, AND I HAVE NEVER AND I ASK YOU TO TELL ME WHERE THERE IS ANY QUESTION ABOUT THE RELIABILITY OF A SIMPLE URINE TEST.

WELL, ANY TIME YOU HAVE SCIENTIFIC EVIDENCE, YOU HAVE TO HAVE A MEASURE OF RELIABILITY. AND IN ADDRESSING --

JUSTICE PARIENTE HAS TALKED ABOUT THAT AND WE DO THAT ALL OF THE TIME FOR COURT CASES FOR DNA, HAIR, BLOOD.

BUT THOSE PARTICULAR PIECES OF EVIDENCE DON'T COME UNDER A SPECIFIC STATUTE THAT SAYS WE ARE REQUIRING THAT THERE BE AN APPROVED TEST. THAT IS WHAT MAKES THE DISTINCTION, AND WITH REGARD TO THE WHOLE ISSUE OF THE PRESUMPTIONS THAT THAT IS WHY THEY HAVE APPROVED A BREATH TEST AND A BLOOD TEST, BECAUSE IF YOU GET RESULTS AT .08 OR HIGHER, YOU GET THE PRESUMPTIONS, THAT IS A LIMITED UNDERGO OF THE IMPLIED

CONSENT LAW. IF YOU LOOK TO ROBINSON AT 604 SO.2D 683 AND DECIDED IN MISS SCAVINO'S BRIEF, THE REAL PURPOSE IS CONSENT. THE PURPOSE WAS NOT TO GET PRESUMPTIONS. THAT CAME UP AFTER THE IMPLIED CONSENT WARNING OR IMPLIED CONSENT LAW. THE PURPOSE WAS TO HAVE A UNIFORM PREDICATE FOR ADMISSIBILITY THAT GUARANTEES RELIABILITY, WHICH COMES RIGHT BACK TO WHAT JUSTICE WELLS AND JUSTICE ANSTEAD WERE TALKING ABOUT.

ANSWER MY QUESTION. DO YOU KNOW FACTUALLY OF THE RELIABILITY OF ANY URINE TEST THAT IS USED THROUGHOUT OUR CULTURE AND SOCIETY, EVERYDAY BY PHYSICIANS, I AM EMPLOYERS, DRUG TREATMENT FACILITIES, ET CETERA?

I CAN'T ANSWER THAT QUESTION INTELLIGENTLY, BECAUSE WE DIDN'T, THE FOCUS OF MY CHALLENGE WAS NOT WITH REGARD TO THE RELIABILITY. THE FOCUS WAS, IS THE PROCEDURE, ONE, DOES THE RULE REQUIRE AN APPROVED PROCEDURE. HAS THAT PROCEDURE OR WHATEVER PROCEDURE IS BEING USED, HAS IT EVER BEEN PROMULGATED, AND THEN ULTIMATELY, THE FINAL QUESTION WAS IF WE DON'T HAVE AN IMPLIED CONSENT, CAN THE STATE NEVERTHELESS USE IT UNDER, ADMIT IT UNDER THE TRADITIONAL PREDICATE, SO WHETHER OR NOT THE PARTICULAR SAMPLE AND ANALYSIS IN THIS CASE IS RELIABLE, THAT WASN'T THE FOCUS, SO I CAN'T INTELLIGENTLY ANSWER YOUR QUESTION AND SAY, YES, I HAVE CONCERNS IN GENERAL, I WOULD ALWAYS SAY I HAVE CONCERNS WITH REGARD TO ANY SCIENTIFIC EVIDENCE, BECAUSE YOU ALWAYS HAVE TO ENSURE THE RELIABILITY, AND I THINK IN LIGHT OF SOME OF THE THING THAT IS CAME OUT IN THE O.J. SIMPSON CASE, YOU KNOW, THAT THEY WERE ABLE TO CALL CERTAIN QUESTIONS INTO VIEW, WITH REGARD TO THE RELIABILITY OF SOME OF THE SCIENTIFIC EVIDENCE OBTAINED THERE.

BUT WE DON'T, AS A TRADITIONAL CONCEPT, IN CRIMINAL CASES, REQUIRE OR DOES THE LEGISLATURE REQUIRE RULE PROMULGATION BY THE AGENCY THAT IS DOING THE TEST? MAYBE THAT IS A GOOD IDEA, BUT IT ISN'T DUNGEON REALLY. WOULD YOU AGREE WITH THAT? -- BUT IT ISN'T DONE, GENERALLY. WOULD YOU AGREE WITH THAT?

SURE BUT I THINK WITH ALL DUE RESPECT, JUSTICE PARIENTE, I THINK YOU ARE MISSING THE POINT BECAUSE IN A DUI CASE, THE LEGISLATURE HAS SPECIFICALLY SAID WE ARE REQUIRING APPROVED TESTS.

THAT IS WHAT WE ARE DECIDING HERE. IF IT WAS CLEAR, WE WOULDN'T GO THAT EXTRA MILE AND HAVE TWO DISTRICTS REACHING FOR DIFFERENT INTERPRETATIONS. I GATHER THAT YOU ARE SAYING THIS IS AN AMBIGUOUS STATUTE OR --

I THINK IT IS POORLYLY WRITTEN. I DON'T THINK IT IS AMBIGUOUS. IT IS VERBOSE, BUT I THINK IT IS VERY CLEAR. ANOTHER STATE HAS ONE VERY CLEAR AND YOU HAVE ONE VERY CLEAR, AND WE HAVE GOT THE SECOND DISTRICT HAD ONE VERY CLEAR, AND THE OTHER, AND EVERYONE IS SAYING IT IS NOT AMBIGUOUS.

WELL, IT CERTAINLY IS SUBJECT TO MULTIPLE INTERPRETATIONS. BUT MY POINT IS, BECAUSE IT IS VERY BROES -- VERBOSE, AND THEY ADDED THAT EXTRA LANGUAGE AND THEY SEPARATED IT OUT WITH COMMAS, THAT IS JUSTIFYING THE STATE'S ARGUMENT THAT THE TERM APPROVED, AND THE FIFTH DISTRICT, IN THEIR OPINION, THAT THE TERM "APPROVED", IS NOT RELYING OR RELATING OR MODIFYING THE URINE TEST.

BUT WOULD YOU AGREE THAT, IF YOU READ THE WHOLE STATUTE, THAT THERE IS THE ONE THREAD THAT COMES THROUGHOUT THAT WHOLE STATUTE IS THIS, THAT THE CHEMICAL OR PHYSICAL TEST APPLIES TO THE MEASURING THE ALCOHOL CONTENT OF A PERSON'S BLOOD, WHEREAS THE URINE TEST IS USED IN, THROUGHOUT THAT STATUTE, IS FOR THE PURPOSE OF DETECTING THE PRESENCE OF CHEMICAL TESTS FOR CONTROLLED SUBSTANCES. CORRECT?

CORRECT.

AND DO YOU, DO WE JUST READ OUT THE FACT THAT THEY GO THROUGH THIS WHOLE THING ABOUT GIVING THE FDLE AUTHORITY TO PROMULGATE RULES FOR BLOOD AND ALCOHOL TESTS, AND THEN, BUT NOTHING ABOUT IT WITH RESPECT TO URINE TESTS? DO WE JUST NEGLECT THAT PART OF THE STATUTE, AND THAT CONTINUES TO SEPARATE OUT URINE TESTS FOR CHEMICAL SUBSTANCES AND BLOOD AND PHYSICAL TESTS FOR BLOOD ALCOHOL? DO WE JUST IGNORE THAT?

WELL, THE STATUTE AS -- DO WE JUST IGNORE THAT?

WELL, THE STATUTE AS IT READS TODAY HAS BEEN AMENDED MULTIPLE TIMES SINCE THE STATUTE IN 1993.

DO WE CONTINUE TO SEPARATE OUT WHAT IS TO BE DONE FOR AN URINE TEST AND WHAT IS TO BE DONE FOR A BLOOD AND ALCOHOL TEST -- FOR A BLOOD AND ALCOHOL TEST?

NO. I THINK YOU HAVE TO CONSIDER THE STATUTE AS A WHOLE, BUT JUST BECAUSE THEY DIDN'T SPECIFY, THAT WE ARE SAYING THESE ARE THE SPECIFIC RULES FOR HOW THE URINE HAS TO BE TESTED, DIDN'T MEAN THAT THEY DIDN'T WANT AN APPROVED TEST. CLEARLY THEY WANTED SOME MEASURE OR PROCEDURE TO BE IN PLACE BECAUSE THEY TALKED ABOUT IT. THE QUESTION, THEN, BECOMES, IS THE PROCEDURE THAT IS ACTUALLY BEING USED, DOES IT CONSTITUTE A RULE? IF IT DOES, IT HAS TO BE PROMULGATED, TAN WASN'T.

DOES THE LEGISLATURE HAVE TO GIVE THE FDLE THE AUTHORITY TO PROMULGATE THAT RULE?

YES.

AND DID THEY GIVE THAT IN THIS STATUTE?

I BELIEVE THAT, WELL, IN THAT PARTICULAR STATUTE, THEY DID NOT SPECIFY, THEY DID NOT SPECIFY THE AUTHORITY TO THE URINE TEST. HOWEVER, IN 322.63, THEY DID. MY POINT IS, MY POINT IS, THAT, STILL, NOTWITHSTANDING, NOTWITHSTANDING THAT, YOU CANNOT, UNDER EQUAL PROTECTION, SAY WE ARE GOING TO GIVE AN APPROVED TEST TO A PARTICULAR CLASS OF DEFENDANTS, BUT TO THOSE DEFENDANTS WHO ARE PROSECUTED, FOR DUI, BY CONTROLLED SUBSTANCES, AND GET AN URINE TEST, THAT WE ARE NOT GOING TO GIVE THEM AN APPROVED TEST.

ARE THERE, SO GOING BACK TO JUSTICE BELL'S QUESTION, ARE THERE, IN THE STATE OF FLORIDA, NOW, PROMULGATED RULES CONCERNING GIVING URINE TESTS TO DRIVERS OF COMMERCIAL VEHICLES?

NO, MA'AM. FDLE IS IN VIOLATION OF FLORIDA STATUTES.

AND YOU THINK THAT IS PART AND PARCEL OF THIS CASE.

ABSOLUTE SLEUTHLY.

FOR NOT -- ABSOLUTELY.

FOR NOT DEALING WITH THAT STATUTE. DO YOU AGREE?

THAT IS NOT THE STATUTE AT ISSUE. HOWEVER, YOU CANNOT DISREGARD OTHER STATUTES, BECAUSE I THINK IT DOES GIVE OR SHED LIGHT ON THE ISSUE THAT IS BEFORE THE COURT. I AM ALMOST OUT OF TIME. I WOULD LIKE TO ADDRESS BRIEFLY, THE CONCEPT OF THE TRADITIONAL PREDICATE. I DISAGREE WITH MISS SCAVINO IN THIS PARTICULAR CASE. THERE IS A BIG

DIFFERENCE BETWEEN BLOOD AND BREATH. ALL OF THOSE BLOOD CASES THAT SHE CITED, WHERE VIOLATIONS OF IMPLIED CONSENT OCCURRED AND THE STATE WAS ALLOWED TO USE THE TRADITIONAL PREDICATE, BLOOD IS DIFFERENT BECAUSE YOU CAN TAKE BLOOD BY FORCE. THE PERSON CAN BE KICKING AND SCREAMING. YOU CAN TAKE THAT WITHOUT CONSENT. YOU CANNOT DO THAT WITH BREATH. THERE IS NO DISTINCTION BETWEEN BREATH AND URINE, SO THE DISTINCTION THAT SHE CALLS UPON FROM THE POLLACK CASE, IS ONE WITHOUT ANY SUBSTANCE. ESSENTIALLY WHAT HAPPENS IS THAT, WITH A BREATH TEST OR URINE TEST AS IN POLLACK, THE SAME, JUSTICE ANSTEAD MR. CHIEF JUSTICE

EXPIRED. WE WILL HAVE TO END ON THAT NOTE. WE HAVE, YOU HAVE WRITTEN EXTENSIVE BRIEFS ON THIS ISSUE, TOO. THANK I VERY MUCH. MR. MARSHAL, HOW MUCH TIME IS LEFT. COUNSEL WILL.

-- COUNSEL.

GOOD MORNING AGAIN, YOUR HONORS. I WOULD LIKE TO ADDRESS TWO POINTS ON REBUTTAL, TWO ISSUES THAT WERE ADDRESSED BY THE RESPONDENT, THE FIRST DEALING WITH THIS OTHER STATUTE, SECTION 322.63, DEALING WITH KHMER SHALING VEHICLES. I THINK THIS -- WITH COMMERCIAL VEHICLES. I THINK THIS STATUTE IS ACTUALLY SUPPORTIVE OF THIS STATE'S POSITION THAT, IF THE LEGISLATURE HAD INTENDED FOR THE WORD APPROVED TO APPLY TO THE WORD URINE, IT WOULD HAVE DONE EXACTLY THE WAY IT HAD IN SECTION 322.1923. BUT THAT IS NOT THE CASE IN OUR PARTICULAR STATUTE, SECTION SECTION --

IN HIS ARGUMENT, THE STATUTES REALLY READ THE SAME, IF YOU TAKE OUT THE LANGUAGE IN THERE THAT EXPLAINS THE BREATH TEST, I BELIEVE IT IS, SO HOW DO YOU RESPOND TO THAT?

I DISAGREE WITH THAT. I THINK ONE OF THE RULES OF STATUTORY CONSTRUCTION THAT THIS COURT SHOULD CONSIDER IS THIS VIEW OF ALL OTHER RELATED STATUTES AND IT SHOULD ALL BE IN HARMONY, AND I THINK THAT IS SORT OF WHAT THE RESPONDENT IS ASKING THIS COURT TO DO IS TO LOOK AT THAT STATUTE AND TO SAY THAT THAT IS SOMEHOW, INDICATIVE OF WHAT THE LEGISLATURE INTENDED, AND OUR PARTICULAR STATUTE 316.1932, AND I THINK THAT STATUTE, REALLY, FIRST OF ALL, HAS NOTHING TO DO, THAT STATUTE IS COMMERCIAL VEHICLES, BUT, ALSO, THERE ARE SO MANY OTHER RELATED STATUTES IN CHAPTER 316, THAT WOULD SUPPORT THE STATE'S POSITION THAT BLOOD AND BREATH TESTING WERE CERTAINLY SOMETHING THAT THE LEGISLATURE DECIDED THAT NEEDED RULE PROMULGATION, WHEREAS URINE TESTING DIDN'T, SO I THINK JUST STATUTORY --

DO YOU AGREE WITH HIS INTERPRETATION OF THE COMMERCIAL LICENSEES, THAT THAT STATUTE DOES REQUIRE THE DEPARTMENT TO HAVE THE RULE.

I WOULD AGREE WITH THAT, YES.

WITH REGARD TO URINE TESTING.

YES.

WHY WOULD THE DEPARTMENT WANT TO HAVE ONE RULE WITH REGARD TO COMMERCIAL DRIVERS AND URINE TESTING AND ANOTHER RULE FOR THE REST OF US FOLKS.

I CERTAINLY COULDN'T FIND ANY TYPE OF LEGISLATIVE HISTORY WITH RESPECT TO THAT, BUT I THINK CLEARLY THERE IS A DIFFERENCE BETWEEN A REGULAR CITIZEN, WHICH IS CONTEMPLATED IN CHAPTER 316, AND COMMERCIAL DRIVERS IN CHAPTER 322.

WHEN IT COMES TO THE URINE TESTING ASPECT OF IT, IS THERE, REALLY --

WELL, YOU ARE TALKING ABOUT DRIVERS IN THIS CASE, IN CHAPTER 32, 322, THAT ARE CERTAINLY DRIVING LONGER DISTANCES, THAT ARE CARRYING HEAVIER LOADS, CERTAINLY MORE OF A POTENTIAL FOR HARM AND DANGER TO OTHER DRIVERS IN THE STATE OF FLORIDA, PERHAPS THAT IS THE REASON WHY THE LEGISLATURE REQUIRED SOME TYPE OF RULE TESTING, WITH RESPECT TO COMMERCIAL DRIVERS AND NOT WITH, AND NOT ANY OTHER OTHER PARTICULAR SUBSECTION, SO I THINK WHAT IT DOES ACTUALLY DOES SHOW, THOUGH, IS THAT THE LEGISLATURE CLEARLY INTENDED ONE OVER THE OTHER.

ONE OF THE OTHER POINTS THAT RESPONDENT MADE, IS THAT THE ACTUAL CONCEPT FORM INDICATES THAT THIS WILL BE AN APPROVED URINE TEST. DOES THAT FIGURE INTO WHETHER OR NOT A DEFENDANT HAS SOME KIND OF RIGHT TO EXPECT THAT HIS URINE WOULD BE TESTED IN SOME KIND OF APPROVED MANNER?

WELL, ACTUALLY I WOULD DISAGREE WITH THAT, JUST BECAUSE I THINK THE RECORD IN THIS CASE, THERE IS NO IMPLIED CONSENT FORM. ALL WE HAVE IS TESTIMONY AT THE MOTION IN LIMINE HEARING, WHERE THE DEFENSE COUNSEL DID STIPULATE THAT HIS CLIENT WAS READ IMPLIED CONSENT AND WITH REFERENCE TO THE CRIMINAL REPORT AFFIDAVIT. THERE ISN'T THE ACTUAL FORM THAT WAS READ TO THE RESPONDENT, SO I DON'T REALLY KNOW WHAT LAW ENFORCEMENT SAID. ION IF LAW ENFORCEMENT USED THE WORD "APPROVED" OR NOT.

IS -- I DON'T KNOW IF LAW ENFORCEMENT USED THE WORD "APPROVED-" OR NOT.

IS THAT USED ON THE FORM?

I THINK THE FLORIDA DEPARTMENT OF LAW ENFORCEMENT TAKES THE LANGUAGE FROM 322.1932, BUT I DON'T KNOW IF IT USES THE FORM. I DON'T KNOW.

IT IS NOT A FORM, THOUGH, SET OUT IN THE STATUTES.

NO. FROM WHAT I HAVE SEEN OF THAT FORM, IT TRACKS THE LANGUAGE IN THE STATUTE. WITH RESPECT TO MY SECOND ISSUE THAT I WOULD LIKE TO DISCUSS, IS SPECIFICALLY WHAT JUSTICE QUINCE WAS ADDRESSING WITH REGARDS TO RESPONDENT'S ARGUMENT THAT URINE TESTING IS SOMEHOW SUBSUMED IN THE WORD CHEMICAL TEST, AND THAT ACTUALLY IS A ARGUMENT THAT THE PILLER DECISION, THE FIFTH DISTRICT COURT OR THE FIFTH DISTRICT DECISION, WHICH CERTIFIED CONFLICT WITH BODDEN, SPECIFICALLY REJECTED THAT ARGUMENT.

CHIEF JUSTICE: WE ARE GOING TO HAVE TO TERMINATE ON THAT NOTE, TOO, BECAUSE YOUR TIME IS UP. WE APPRECIATE, YOU ALL, ESPECIALLY RESPONDING TO OUR QUESTIONS.